THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

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SC Court of Appeals

The Honorable Thomas A. Russo, Circuit Court Judge

C.A. No.: 2015-CP-21-03521

Sunday Kay Murphy, individually and in a representative capacity for all others similarly situated ..... Appellant,

v.

Five Star Florence, LLC ..... Respondent.

BRIEF OF RESPONDENT

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2. DID THE TRIAL COURT CORRECTLY FIND THAT THERE WAS NOT AN AGREEMENT TO ARBITRATE UNDER THE SOUTH CAROLINA UNIFORM ARBITRATION ACT BECAUSE THE MANDATORY NOTICE PROVISIONS OF S.C. CODE ANN. § 15-48-10 WERE NOT MET?

COUNTERSTATEMENT OF THE CASE AND FACTS

I. The parties agreed to arbitrate any dispute between them.

This appeal arises from the trial court's threshold determination of arbitrability based on the documents signed by the parties on July 31, 2015 in connection with Sunday Kay Murphy's purchase of a vehicle from Five Star Florence, LLC ("Five Star").[1] In the course of finalizing their transaction, the parties executed a Purchase Order and Arbitration Agreement, each of which includes language requiring the parties to arbitrate any dispute between them. (R. at 47-49). The parties agree that this transaction implicates interstate commerce.

A. The Purchase Order

The Purchase Order includes the following language on its front page:

> **This contract is subject to arbitration under the South Carolina Uniform Arbitration Act, S.C. Code 15-48-10 et. seq.**

(Purchase Order, R. at 47-48). The back of the Purchase Order further provides,

> **Arbitration Required by This Agreement.** The parties agree that, prior to the exercise of any other remedy allowed by law, any dispute, controversy, or claim arising out of or relating to the sale of the motor vehicle, negotiations for its purchase (including claimed fraudulent inducement), financing of its purchase (if any), or to this Purchase Order or to any other agreement between the parties relating to the motor vehicle (including the parties' retail installment sales contract if any), shall be submitted to binding arbitration; however, claims arising under the federal Magnusson Moss Warranty Act are not subject to arbitration. *If the transaction involves interstate commerce, arbitration as described hereunder shall be governed solely by the Federal Arbitration Act, 9 U.S.C. section 1, et seq, and the South Carolina Arbitration Act shall not apply.* Arbitration shall be administered by the American Arbitration Association under its Commercial Arbitration Rules, or such other arbitrator as may be mutually agreeable to the parties. Such arbitration shall be conducted within 100 miles of the location of the sale of the motor vehicle. Each party shall pay its own costs. Any judgment on the award rendered by the arbitrator in such binding arbitration may be entered in any

[1] The background facts are as set forth in the trial court's order. (R. at 1-3). Murphy seeks to recover allegedly improper closing fees collected by Five Star under the Dealers Act, S.C. Code Ann. §§ 56-15-10 to -600 ("Dealers Act") on behalf of a class. (R. at 13-16).

court having jurisdiction thereof. *Nothing contained herein shall be deemed to require arbitration by any entity not a party to this Purchase Order.*

(*Id.* (emphasis added)).[2] The Purchase Order further provides that it "supercede[s] any *prior* agreement" and that it "comprise[s] the complete and exclusive statement of the terms of this transaction." (*Id.* (emphasis added)).

B. The Arbitration Agreement

On the same date, the parties executed an Arbitration Agreement, which provides in full:

PLEASE REVIEW - IMPORTANT - AFFECTS YOUR LEGAL RIGHTS

1. EITHER YOU OR WE MAY CHOOSE TO HAVE ANY DISPUTE BETWEEN US DECIDED BY ARBITRATION AND NOT IN COURT OR BY JURY TRIAL.

2. *IF A DISPUTE IS ARBITRATED, YOU WILL GIVE UP YOUR RIGHT TO PARTICIPATE AS A CLASS REPRESENTATIVE OR CLASS MEMBER ON ANY CLASS CLAIM YOU MAY HAVE AGAINST US INCLUDING ANY RIGHT TO CLASS ARBITRATION OR ANY CONSOLIDATION OF INDIVIDUAL ARBITRATIONS.*

3. DISCOVERY AND RIGHTS TO APPEAL IN ARBITRATION ARE GENERALLY MORE LIMITED THAN IN A LAWSUIT, AND OTHER RIGHTS THAT YOU AND WE WOULD HAVE IN COURT MAY NOT BE AVAILABLE IN ARBITRATION.

Any claim or dispute, whether in contract, tort, statute or otherwise (including the interpretation and scope of this Arbitration Agreement, and the arbitrability of the claim or dispute), between you and us or our employees, agents, successors or assigns, which arises out of or relates to your credit application, purchase, lease, or condition of the vehicle, any retail installment sale contract or lease agreement or any resulting transaction or relationship (including any such relationship with third parties who do not sign your purchase, lease agreement, or financing contract) shall, at your or our election, be resolved by neutral, binding arbitration and not by a court action. If federal law provides that a claim or dispute is not subject to binding arbitration, this Arbitration Agreement shall not apply to such

[2] The trial court based its rulings on general preemption law and the Arbitration Agreement, and as a result, it did not interpret the arbitration language on the back of the Purchase Order. (R. at 6). Five Star contends this language presents alternate sustaining grounds and may be used as a basis to affirm the trial court's order pursuant to Rule 220, SCACR. For that reason, it has been included here and is argued below.

claim or dispute. Any claim or dispute is to be arbitrated by a single arbitrator on an individual basis and not as a class action. *You expressly waive any right you may have to arbitrate a class action.* You may choose the American Arbitration Association, 1633 Broadway, 10th Floor, New York, New York 10019 (www.adr.org), or any other organization to conduct the arbitration subject to our approval. You may get a copy of the rules of an arbitration organization by contacting the organization or visiting its website.

Arbitrators shall be attorneys or retired judges and shall be selected pursuant to the applicable rules. The arbitrator shall apply governing substantive law and the applicable statute of limitations. The arbitration hearing shall be conducted in the federal district in which you, reside unless the Seller-Creditor is a party to the claim or dispute, in which case the hearing will be held in the federal district where this transaction was originated. We will pay your filing, administration, service or case management fee and your arbitrator or hearing fee all up to a maximum of $5000, unless the law or the rules of the chosen arbitration organization require us to pay more. The amount we pay may be reimbursed in whole or in part by decision of the arbitrator if the arbitrator finds that any of your claims is frivolous under applicable law. Each party shall be responsible for its own attorney, expert and other fees, unless awarded by the arbitrator under applicable law. If the chosen arbitration organization's rules conflict with this Arbitration Agreement, then the provisions of this Arbitration Agreement shall control. *Any arbitration under this Arbitration Agreement shall be governed by the Federal Arbitration Act (9 U.S.C. § 1 et. seq.) and not by any state law concerning arbitration.* Any award by the arbitrator shall be in writing and will be final and binding on all parties, subject to any limited right to appeal under the Federal Arbitration Act.

You and we retain the right to seek remedies in small claims court for disputes or claims within that court's jurisdiction, unless such action is transferred, removed or appealed to a different court. Neither you nor we waive the right to arbitrate by using self-help remedies, such as repossession, or by filing an action to recover the vehicle to recover a deficiency balance, or for individual injunctive relief. Any court having jurisdiction may enter judgment on the arbitrator's award. This Arbitration Agreement shall survive the cancellation, termination, payoff or transfer of any retail installment sale contract or lease agreement, and any related credit, vehicle sale, or lease documents. *If any part of this Arbitration Agreement, other than waivers of class action rights; is deemed or found to be unenforceable for any reason, the remainder shall remain enforceable. If a waiver of class action rights is deemed or found to be unenforceable for any reason in a case in which class action allegations have been made, the remainder of this Arbitration Agreement shall be unenforceable. This Arbitration Agreement is part of any retail installment sale contract or lease agreement you sign and any related credit, vehicle sale, or lease documents.*

(R. at 49, 70 (emphasis added)). The Arbitration Agreement states that it is part of the vehicle sale documents, which would include the Purchase Order.

Murphy now seeks to enforce the header from the front page of the Purchase Order to the exclusion of all of the other arbitration language to which she agreed.

II. The trial court ordered that this matter should proceed to arbitration pursuant to the Federal Arbitration Act.

The trial court's order addressed two motions filed in conjunction with Murphy's Complaint: (1) Murphy's motion to compel arbitration pursuant to the South Carolina Uniform Arbitration Act ("SC Act") (R. at 25), and (2) Five Star's motion to stay proceedings and compel arbitration pursuant to the Federal Arbitration Act ("FAA") (R. at 51-62). The parties agree that arbitration is appropriate, they disagree as to whether the SC Act or the FAA applies and whether the Arbitration Agreement is valid and enforceable.

The trial court, after a hearing and reviewing the arbitration language cited above, ruled that there was not an agreement to arbitrate under the SC Act because the notice provisions of S.C. Code Ann. § 15-48-10 had not been met. (R. at 4). The trial court further found that the Purchase Order constituted a valid agreement to arbitrate under the FAA, which preempts the SC Act to the extent it would defeat arbitration agreements, and that the Arbitration Agreement was valid and enforceable and required arbitration under the FAA. (R. at 1-12). Based on these rulings, the trial court denied Murphy's motion to compel arbitration pursuant to the SC Act and granted Five Star's motion to stay proceedings and compel arbitration pursuant to the FAA. The trial court did not make any further rulings as to arbitrability or the procedure to be applied.

STANDARD OF REVIEW

"Arbitrability determinations are subject to *de novo* review." *Dean v. Heritage Healthcare of Ridgeway, LLC,* 408 S.C. 371, 379, 759 S.E.2d 727, 731 (2014) "The circuit court's determination of whether a claim is subject to arbitration will not be reversed by an appellate court if the finding is reasonably supported by the evidence." *Hall v. Green Tree Servicing, LLC*, 413 S.C. 267, 271, 776 S.E.2d 91, 94 (Ct. App. 2015). "[T]he party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." *Dean,* 408 S.C. at 379, 759 S.E.2d at 731 (quoting *Green Tree Fin. Corp.-Ala. v. Randolph,* 531 U.S. 79, 91 (2000)).

"[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. The heavy presumption of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration." *Landers v. Fed. Deposit Ins. Corp.,* 402 S.C. 100, 109, 739 S.E.2d 209, 213 (2013) (citations and internal quotation marks omitted). This presumption is heightened when the arbitration clauses are broadly written, such as the clauses at issue here. *Id.*

ARGUMENT

Contrary to the argument presented by Murphy, the dispute here is not over which procedural rules apply, but rather which body of substantive law applies.[3] All the trial court did was determine that both the Purchase Order and Arbitration Agreement contained valid agreements to arbitrate by operation of the FAA and that Five Star's Motion to Stay Proceedings

[3] With respect to procedure and forum, both the Purchase Order and the Arbitration Agreement invoke the American Arbitration Association ("AAA") or other mutually agreeable organization. At the hearing in this matter, Murphy's counsel referenced the distinction between "applying a law to enforce arbitration and choosing a forum." (R. at 93). That distinction has been lost in the briefing of this matter.

and Compel Arbitration must be granted. The trial court did not rule that one set of procedural rules preempted another, nor did it replace one set of rules with another. Instead, and consistent with the case law cited by Murphy, the trial court found that there was not an agreement to arbitrate under the SC Act for failure to comply with the notice provision of S.C. Code Ann. § 15-48-10, but there was an agreement to arbitrate under the FAA under well-settled preemption principles.

"Unless the parties have contracted to the contrary, the FAA applies in federal or state court to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction." *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538–39, 542 S.E.2d 360, 363 (2001) (footnote omitted). If there is an agreement to arbitrate that is subject to the FAA, substantive questions will be guided by federal law. *Henderson v. Summerville Ford-Mercury Inc.*, 405 S.C. 440, 449, 748 S.E.2d 221, 226 (2013). To the extent state substantive law conflicts, it is preempted by the FAA. *Tritech Elec., Inc. v. Frank M. Hall & Co.*, 343 S.C. 396, 400, 540 S.E.2d 864, 866 (Ct. App. 2000). The trial court correctly found that there was not an agreement to arbitrate under the SC Act and compelled arbitration under the FAA.

I. There was not a valid agreement to arbitrate under the SC Act.

Murphy concedes that this transaction involved interstate commerce. (Brief of Appellant at Argument I.A.3). To be enforceable under the FAA, the arbitration provision must be written and either (1) designate the FAA as the governing law or (2) involve interstate commerce. *See* 9 U.S.C. § 2 (stating that the FAA applies to written arbitration provisions contained in a "contract evidencing a transaction involving commerce . . . ."). Here, both of these tests are met: the action involves interstate commerce and the parties designated the FAA as the governing law in both the Purchase Order and the Arbitration Agreement.

A. The SC Act's notice provisions were not met; therefore, the trial court correctly found that there was not an enforceable agreement to arbitrate under the SC Act and that there was a valid agreement to arbitrate under the FAA.

S.C. Code Ann. § 15-48-10 provides:

> A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. Notice that a contract is subject to arbitration pursuant to this chapter shall be typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract and unless such notice is displayed thereon the contract shall not be subject to arbitration.

By statute, a valid agreement under § 15-48-10 is required for a party to invoke proceedings to compel or stay arbitration under the SC Act. S.C. Code Ann. § 15-48-20 ("On application of a party *showing an agreement described in § 15-48-10*, and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration . . .")(emphasis added).

South Carolina courts have repeatedly held that an agreement to arbitrate under the SC Act is not valid if the notice requirements of S.C. Code Ann. § 15-48-10 are not met. *See Soil Remediation Co. v. Nu-Way Envtl., Inc.*, 323 S.C. 454, 457, 476 S.E.2d 149, 151 (1996) (reversing decision of Court of Appeals that arbitration language that was not underlined could satisfy notice requirement of Section 15-48-10). As stated in *Soil Remediation,*

> Our conclusion is compelled not only by the unambiguous wording of section 15–48–10, but also by case law, which has strictly construed this provision. *See Osteen v. T.E. Cuttino Constr. Co.*, 315 S.C. 422, 424, 434 S.E.2d 281, 283 (1993) ("It is undisputed that the contract does not conform to the requirements of section 15–48–10(a)."); *Timms v. Greene,* 310 S.C. 469, 472, 427 S.E.2d 642, 643 (1993) (Declaring that "the State Act is clear with regard to the notice requirement," the decision affirmed circuit court's finding that section 15–48–10 had not been satisfied, because the contract did not contain on its first page any mention of arbitration.); *Circle S. Enters., Inc. v. Stanley Smith & Sons,* 288 S.C. 428, 343 S.E.2d 45 (Ct.App.1986) (Arbitration provision was held not to be

> enforceable, because it failed to meet the section 15–48–10 requirement that notice appear on the first page of the contract.).

Id. (footnotes omitted).

Here, the clause referencing the SC Act was not in all capital letters; therefore, it is not enforceable under the SC Act. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 589, 553 S.E.2d 110, 114 (2001) ("The notice provision must be typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract. No other variation is acceptable."). Murphy cannot waive this failure to comply with the statute. It does not matter that the party arguing that the notice provision had not been met is the party that drafted the original agreement, especially here where Murphy has not argued that any kind of estoppel might apply. *See id.* at 590, 553 S.E.2d at 115 (holding SC Act did not apply because notice provision was not met, even though party seeking to assert the SC Act did not draft the agreement and argued the drafting party was estopped from asserting the notice defect).

As a rule for transactions in interstate commerce, the FAA preempts the notice provision of the SC Act to the extent it would defeat arbitration. *Id.* Therefore, the trial court correctly found there was an agreement to arbitrate by operation of the FAA after it found that there was not an agreement to arbitrate under the SC Act.

B. The Purchase Order and the Arbitration Agreement both specify that the FAA applies.

Murphy argues the clause on the front of the Purchase Order referencing the SC Act to the exclusion of the arbitration language on the back of the Purchase Order and the Arbitration Agreement, both of which state that the FAA applies. In essence, she argues the Court should ignore the parts of the agreement that plainly provide for arbitration under the FAA. This approach is inconsistent with basic rules of contract construction.

Contract language must be construed according to its plain meaning. *Holden v. Alice Mfg., Inc.*, 317 S.C. 215, 221, 452 S.E.2d 628, 631 (Ct. App. 1994). If the language is clear and unambiguous, it determines the rights and obligations of the parties as a matter of law and no additional evidence will be considered. *Id.* In addition, contracts must be interpreted as a whole "so as to give effect to all of their provisions." *Reyhani v. Stone Creek Cove Condo II Horizontal Prop. Regime*, 329 S.C. 206, 212, 494 S.E.2d 465, 468 (Ct. App. 1997).

Murphy admits that this transaction involved interstate commerce. (Brief of Appellant at Argument I.A.3). As such, the Purchase Order clearly states that the FAA applies, as follows: "[i]f the transaction involves interstate commerce, arbitration as described hereunder shall be governed solely by the Federal Arbitration Act, 9 U.S.C. section 1, et seq, and the South Carolina Arbitration Act shall not apply." (R. at 48). This clause is not inconsistent with the language on the front of the Purchase Order, but merely provides further explanation and clarifies that the arbitration of matters involving interstate commerce will be pursuant to the FAA.

The portion of the clause in the Purchase Order providing for arbitration before AAA is perfectly consistent with this language, as the FAA contemplates that parties may agree to an arbitration forum, means of choosing arbitrators, and procedures.[4] *See* 9 U.S.C. § 3 (requiring

[4] Murphy references the AAA's "Supplementary Rules for Class Actions" and claims that the existence of these rules somehow indicates consent to class arbitration. (Brief of Appellant at Argument I.B). Although the Court need not reach this issue to affirm the trial court, Five Star notes that these Supplementary Rules have not been incorporated into the parties' agreements and further notes that the Supplementary Rules themselves provide, "[i]n construing the applicable arbitration clause, the arbitrator shall not consider the existence of these Supplementary Rules, or any other AAA rules, to be a factor either in favor of or against permitting the arbitration to proceed on a class basis." Rule 3, AAA Supplementary Rules for Class Actions. Thus, nothing about the existence of these rules evidences any intent on the part of the parties to allow this action to proceed on behalf of a class. *See Reed Elsevier, Inc. ex rel. LexisNexis Div. v. Crockett*, 734 F.3d 594, 599–600 (6th Cir. 2013) (noting that incorporation of the Supplementary Rules is unavailing because the rules "expressly state that one should 'not consider the existence of these Supplementary Rules, or any other AAA rules, to be a factor in

arbitration to be "had in accordance with the terms of the agreement"); 9 U.S.C. § 4 (allowing parties to petition district court for "an order directing that such arbitration proceed in the manner provided for in such agreement"); 9 U.S.C. § 5 ("If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed . . . ."); *see also* S.C. Code Ann. § 15-48-30 ("If the arbitration agreement provides a method of appointment of arbitrators, this method shall be followed.").

These issues are separate and distinct from that of the governing, substantive law. The United States Supreme Court has recognized that "parties [to an arbitration agreement] are generally free to structure their arbitration agreements as they see fit," and may "specify by contract rules under which that arbitration will be conducted." *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989). Because "[a]rbitration is a matter of contract," courts should "therefore rigorously enforce arbitration agreements according to their terms, including terms that specify with whom [the parties] choose to arbitrate their disputes and the rules under which that arbitration will be conducted." *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013) (citations omitted) (quoted in *Cape Romain Contractors, Inc. v. Wando E., LLC*, 405 S.C. 115, 125–26, 747 S.E.2d 461, 466 (2013)); *see Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985) (The FAA "leaves no place for the exercise of discretion by a [trial] court, but instead mandates that [trial] courts *shall* direct the parties to proceed to arbitration . . . ."). Thus, while the FAA will control the substantive law applicable to this matter; the parties' agreements will also be enforced according to their terms.

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favor of or against permitting arbitration to proceed on a class basis."); *Chesapeake Appalachia, Ltd. v. Scout Petroleum*, 809 F.3d 746, 761 (3rd Cir. 2016) (ruling that AAA Commercial Rules do not mention class arbitration and contemplate only bi-lateral arbitration).

In addition, the language of the Purchase Order is consistent with the language of the Arbitration Agreement, which provides, "[a]ny arbitration under this Arbitration Agreement shall be governed by the Federal Arbitration Act (9 U.S.C. § 1 et. seq.) and not by any state law concerning arbitration." Therefore, there is nothing ambiguous about the terms of the Purchase Order and the Arbitration Agreement choosing the FAA as the governing law, and those clauses must be enforced as written.

II. The Arbitration Agreement is valid and enforceable.

Murphy has raised these arguments relating to the SC Act in hopes of avoiding federal jurisprudence that would prevent her from pursuing this action as a class arbitration. For the same reason, she has challenged the validity of the Arbitration Agreement. As discussed above, she has the burden in asserting this challenge. As will be shown below, the trial court correctly found that the Arbitration Agreement, including the class action waiver, is valid and enforceable.[5]

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[5] Moreover, class arbitration is not available under the terms of the Purchase Order as there is no expressed intent to allow class arbitration, but rather the arbitration clause is limited to "any dispute, controversy, or claim arising out of or relating to the sale of the motor vehicle, negotiations for its purchase (including claimed fraudulent inducement), financing of its purchase (if any), or to this Purchase Order or to any other agreement between the parties relating to the motor vehicle (including the parties' retail installment sales contract if any)" and "[n]othing contained herein shall be deemed to require arbitration by any entity not a party to this Purchase Order. *See Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662, 682-87 (2010) (finding parties cannot be forced to arbitrate on a class-wide basis absent "a contractual basis for concluding that the party agreed to do so" and"[a]n implicit agreement to authorize class-action arbitration, [ ] is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate" because "the differences between bilateral and class-action arbitration are too great for arbitrators to presume, consistent with their limited powers under the FAA, that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings."). The mere application of the Dealers Act to the underlying transaction does not change this result as it provides for both individual actions and class actions in the Circuit Court. S.C. Code Ann. § 56-15-110. Therefore, there is no basis for a court or arbitrator to discern any intention to agree to class arbitration in the Purchase Order as required by *Stolt-Nielson*.

A. The Arbitration Agreement was executed in conjunction with the Purchase Order. It is not a prior agreement that would be cancelled by the Purchase Order's integration clause.

As noted by the trial court, the Arbitration Agreement was entered at the same time as the Purchase Order. (R. at 8). It is not a prior agreement that would be cancelled by the Purchase Order. To the contrary, the Arbitration Agreement expressly states that it is part of the vehicle sale documents, which would include the Purchase Order. (R. at 49, 70).

By signing the separate Arbitration Agreement, Murphy is charged with full knowledge and assent to its contents.

> A person who signs a contract or other written document cannot avoid the effect of the document by claiming he did not read it. A person signing a document is responsible for reading the document and making sure of its contents. Every contracting party owes a duty to the other party to the contract and to the public to learn the contents of a document before he signs it. One who signs a written instrument has the duty to exercise reasonable care to protect himself. The law does not impose a duty on [a financial institution] to explain to an individual what he could learn from simply reading the document.

Regions Bank v. Schmauch, 354 S.C. 648, 663-64, 582 S.E.2d 432, 440 (Ct. App. 2003) (citations and internal quotation marks omitted). Murphy cannot avoid the terms of this agreement now.

B. Under the FAA, the class waiver found in the Arbitration Agreement is valid and enforceable.

The FAA makes agreements to arbitrate "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2; *see AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 336 (2011). Courts are required to "rigorously enforce" the terms of arbitration agreement. *Am. Exp. Co.* at 233.

The United States Supreme Court has further held that the goals of the FAA and its policy favoring arbitration are to control even where a statute confers a right to bring an action in a class capacity. *Id.* (finding that rule requiring rigorous enforcement of arbitration agreements

"holds true for claims that allege a violation of a federal statute, unless the FAA's mandate has been overridden by a contrary congressional command" and that no such command was present in the federal antitrust statutes (citations and quotations omitted)). Statutory permission to bring a class action does "'not mean that individual attempts at conciliation were intended to be barred.'" *Id.* at 237 (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991)).

The Supreme Court left no room for the arguments raised by Murphy here by stating "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* at 344. Moreover, individual actions are perfectly consistent with the language of the Dealers Act, which expressly provides for both individual and class actions in S.C. Code Ann. § 56-15-110. Thus, the General Assembly obviously intended that rights on the Dealers Act could be addressed on an individual basis.

The Arbitration Agreement plainly states that Murphy gives up any right to pursue this action as a class action and that "if a waiver of class action rights is deemed or found to be unenforceable for any reason in a case in which class action allegations have been made, the remainder of this Arbitration Agreement shall be unenforceable." Thus, invalidating the class waiver would have the effect of invalidating the Arbitration Agreement as a whole in violation of *Concepcion.*

Murphy seeks to avoid this precedent, relying on *Herron v. Century BMW*, 387 S.C. 525, 693 S.E.2d 394 (2010) ("Herron I"), *cert. granted, judgment vacated sub nom. Sonic Auto., Inc. v. Watts*, 563 U.S. 971 (2011), and *opinion reinstated,* 395 S.C. 461, 719 S.E.2d 640 (2011) ("Herron II"). The United States Supreme Court vacated that opinion and remanded it "to the Supreme Court of South Carolina for further consideration in light of *[] Concepcion* . . ." This

order vacating Herron I, establishes that there is not a non-waivable right to bring a class arbitration under S.C. Code Ann. § 56-15-110 and that *Concepcion* applies to claims such as this one. The South Carolina Supreme Court reinstated the ruling in Herron I because the issue of federal preemption under the FAA had not been raised in that case, not because there remains a non-waivable right to bring class actions under S.C Code Ann. § 56-15-110(2). *Herron II*, 395 S.C. at 470, 719 S.E.2d at 644-45. The issue of preemption was raised to and ruled on by the trial court here and is fully preserved for purposes of this appeal.

Post-Herron II, this Court has upheld a class action waiver in an arbitration agreement where the plaintiff purported to state claims under the Dealers Act on behalf of a class. *York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 91–94, 749 S.E.2d 139, 151–53 (Ct. App. 2013). In finding that S.C. Code Ann. § 56-15-110(2) did not prevent parties from contractually waiving any right to class arbitration, this Court reasoned:

> Although our supreme court technically "reinstated" its *Herron I* opinion, in light of (1) that case's profound preservation deficiencies; (2) the opinion of the Supreme Court of the United States vacating *Herron I*; and (3) the applicable holdings within *Concepcion*, the *Herron I* reinstatement did not signify a post-*Concepcion* position that the Dealers Act provision is immune to FAA preemption. Consistently, numerous other jurisdictions now apply *Concepcion* to preempt similar state laws that, if not preempted, would invalidate class action waivers on public policy grounds. . . . Accordingly, the provisions banning class arbitration in the present case cannot be invalidated based upon public policy considerations embodied within state law. Rather, the arbitration clause[s] at issue here must be enforced according to [their] terms, which requires individual arbitration and forecloses class arbitration.

Id. (citations and quotations omitted). Under the *York* decision as well as numerous United States Supreme Court opinions, the class waiver in the Arbitration Agreement is valid and enforceable. Given this background, Murphy's arguments relating to "self-defeating" language are unavailing. The class waiver is enforceable, and as a result, so is the Arbitration Agreement.

C. Murphy's arguments relating to unconscionability of the Arbitration Agreement are conclusory, unpreserved, and she has not met her burden of showing one-sided contract provisions that are so oppressive no reasonable person would make them.

Lastly, there is nothing unconscionable about the Arbitration Agreement. In South Carolina, unconscionability is "the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *York*, 406 S.C. at 85, 749 S.E.2d at 148 (quotation omitted). Murphy would have the burden of proving the Arbitration Agreement was unconscionable. *Dean,* 408 S.C. at 379, 759 S.E.2d at 731 (quoting *Green Tree Fin. Corp.-Ala. v. Randolph,* 531 U.S. 79, 91 (2000) ("[T]he party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration.")).

Murphy raises the term "unconscionablilty," but does not provide any analysis of why the doctrine might invalidate the Arbitration Agreement in this case; therefore, this argument should be deemed conclusory and not considered by the Court. *See South Carolina Dep't of Soc. Servs. v. Sims*, 359 S.C. 601, 606, 598 S.E.2d 303, 306 (Ct. App. 2004) (conclusory nature of arguments and lack of supporting authority could lead to finding that issues on appeal have been abandoned); *Hunt v. South Carolina Forestry Comm'n*, 358 S.C. 564, 573, 595 S.E.2d 846, 851 (Ct. App. 2004) (issues raised in a brief but not supported by authority are deemed abandoned and will not be considered on appeal). Her argument on appeal is verbatim the argument presented to the trial court. She cannot change or correct the deficiencies in this argument on reply. *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 692 (Ct. App. 2001) ("Additionally, even though [Appellant] more fully addressed the issue in its reply brief, an argument made in a reply brief cannot present an issue to the appellate court if it was not addressed in the initial brief.").

In addition, the trial court did not rule on Murphy's arguments (1) that "the 'Arbitration Agreement' is unconscionable because it attempts to supplant the complete and valid arbitration agreement in the Purchase Order" and that the Arbitration Agreement "is not valid because it is irreparable in conflict with the arbitration provisions contained within the four corners of the Purchase Order" (Brief of Appellant at Argument I.C.3 & 5), (2) that the Arbitration Agreement contains generally self-defeating terms (Brief of Appellant at Argument I.C.3), and (3) that the Arbitration Agreement is non-mutual (*Id.*). Murphy did not file a motion to reconsider under Rule 59(e), SCRCP. Therefore, these arguments are not preserved. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 734 (1998) (holding arguments must be raised to and ruled on by the trial court to be preserved for review).

Moreover, the Arbitration Agreement is not one-sided, nor are its terms "so oppressive that no reasonable person would make them and no fair and honest person would accept them." The Purchase Order and the Arbitration Agreement are generally consistent and easily reconciled. Both agreements call for arbitration, for the application of the FAA, and for AAA arbitration or some other mutually agreed arbitrator. The terms of the Arbitration Agreement are mutual and do not limit Five Star's liability or limit Murphy's remedies. In addition, the Arbitration Agreement provides that its terms, with the exception of the class waiver, are severable in the event part of the Agreement is found to be unenforceable. Thus, even if some portion of the Arbitration Agreement was found to be unenforceable (other than the class waiver), the Arbitration Agreement as a whole and the class waiver would survive. For these reasons, even if Murphy had preserved these arguments and included proper argument in their support, she cannot meet her burden of showing the terms are one-sided and "so oppressive that

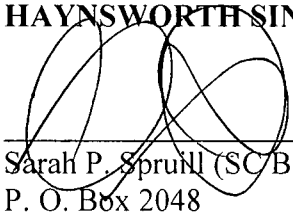
no reasonable person would make them and no fair and honest person would accept them" based on the underlying language of the Arbitration Agreement.

CONCLUSION

For these reasons, the trial court's order compelling arbitration under the FAA pursuant to the parties' agreements in the Purchase Order and the Arbitration Agreement must be affirmed.

Respectfully submitted,

HAYNSWORTH SINKLER BOYD, P.A.



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February 27, 2018

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

RECEIVED
MAR 02 2018
SC Court of Appeals

The Honorable Thomas A. Russo, Circuit Court Judge

C.A. No.: 2015-CP-21-03521

Sunday Kay Murphy, individually and in a representative capacity for all others similarly situated ..... Appellant,

v.

Five Star Florence, LLC ..... Respondent.

CERTIFICATE OF COMPLIANCE

I certify that the Final Brief of Respondent in this matter complies with Rule 211(b), SCACR.

(Signature Page Follows)

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